

ORIGINAL

FEDERAL MARITIME COMMISSION

EXCLUSIVE TUG FRANCHISES -
MARINE TERMINAL OPERATORS
SERVING THE LOWER MISSISSIPPI

Docket No. 01-06

Served: March 29, 2005

**ORDER DENYING PETITION OF RIVER PARISHES
CO., INC. FOR LEAVE TO FILE A MEMORANDUM
AS AMICUS CURIAE AND DISMISSING THE
PROCEEDING**

This proceeding is before the Federal Maritime Commission ("Commission") upon a Petition of River Parishes Co., Inc. ("RIVCO"), for Leave to File a Memorandum as Amicus Curiae in the Commission's review of the two proposed settlements and orders of dismissal in this proceeding. On November 24, 2004, two proposed settlement agreements were submitted to Administrative Law Judge Norman D. Kline ("ALJ"), one between the Commission's Bureau of Enforcement ("BOE") and respondents Bunge North America, Inc.; CHS, Inc.; CGB Enterprises, Inc.; Gulf Elevator and Transfer Co.; L & L Fleeting, Inc.; International Marine Terminals Partnership; Conagra Foods, Inc. d/b/a Peavey Grain; and Zen-Noh Grain Corporation ("8 Respondents"), and another between BOE and respondent ADM/Growmark River Systems, Inc. ("ADM/Growmark"), all of whom (excluding BOE) are collectively referred to as "Respondents." On December 2, 2004, the ALJ approved the proposed settlements and dismissed Respondents from the proceeding.

RIVCO is a tug company serving the Lower Mississippi River. RIVCO moved to intervene in the proceeding as a matter of right,

which motion was granted by the Commission on July 20, 2001. However, RIVCO withdrew from the proceeding on October 22, 2001. RIVCO explained in its withdrawal that, as a result of the Commission restructuring the proceeding "into an evidentiary hearing," it lacked the resources to "participate on a meaningful basis." RIVCO's Notice of Withdrawal of Intervention at 3. RIVCO submits, however, that it provided extensive discovery and "held itself out to provide assistance" to BOE. RIVCO Petition at 3.

RIVCO now seeks, by petition filed December 14, 2004, to submit a memorandum as an amicus curiae pursuant to Rule 76 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.76, to address legal and policy issues relevant to the proposed settlements. In light of RIVCO's petition, the Commission issued a Notice to Review the proposed settlements and orders of dismissal on December 20, 2004. For the reasons set forth below, RIVCO's petition is denied.

POSITIONS OF THE PARTIES

A. RIVCO

RIVCO argues that the Commission should grant its petition because it is directly impacted by the proposed settlements and the proposed settlements are significantly different and less favorable to the public interest than two prior settlements entered into in this proceeding. RIVCO asserts that there are material differences between the previous settlements and the proposed settlements that are not identified, explained or justified by BOE and Respondents in their memoranda in support of the proposed settlements or in the ALJ's orders approving the settlements. In addition, RIVCO avers that the adverse implications of the proposed settlements to the public interest are not addressed or properly explained.

Moreover, RIVCO claims that there is no party to the proceeding that will inform the Commission of these issues as the only remaining parties are those that are parties to the proposed settlement (BOE and Respondents). RIVCO thus contends that its memorandum

of amicus curiae would provide assistance to the Commission "in establishing legal and policy guidelines governing settlements in multiparty investigations initiated by the Commission." RIVCO Petition at 6.

B. BOE

BOE opposes RIVCO's petition. BOE claims that under Rule 76, RIVCO's petition is untimely. BOE argues that because of the nature of a settlement, no further filings were required and, therefore, there is no time frame for the filing of an amicus brief.

BOE further contends that RIVCO fails to support the position of a party, as required by Rule 76. BOE asserts that Rule 76 does not contemplate or provide for amicus curiae that supports neither party, and that RIVCO's petition is more akin to a petition for leave to intervene. BOE avers that RIVCO's interests are truly those of an intervenor as RIVCO primarily advocates for its own interests rather than for the public interest.

BOE also asserts that RIVCO cannot rely on the Commission's recent decision in Sea-Land Service, Inc. - Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984, 29 S.R.R. 1326 (2003). Unlike in Sea-Land, BOE contends, where the Commission explained that it cannot be assumed that every potential amicus would appreciate the legal and policy implications of a proceeding, RIVCO knew at the outset of the proceeding that any resolution of this case had the potential to affect its business. Moreover, BOE argues, RIVCO's participation would not broaden the Commission's understanding of the effects of precedent-setting determinations, because the proposed settlements provide that no third party complaints are to be affected by the settlements, i.e., they are not binding on future litigants.

Finally, BOE asserts that the proposed settlements cannot be considered concurrently with each other or with previous settlement agreements as RIVCO argues. Each settlement agreement, BOE avers,

must be viewed independently.

C. 8 Respondents

The 8 Respondents oppose RIVCO's request and make arguments similar to those of BOE. The 8 Respondents argue that RIVCO's petition is really a renewed attempt to intervene, the petition is untimely, and when RIVCO withdrew from the proceeding it accepted BOE as its advocate in the proceeding. Furthermore, the 8 Respondents assert that the Commission may terminate a Commission initiated proceeding at any time and can even approve a settlement despite the objections of a party.

D. ADM/Growmark

ADM/Growmark opposes RIVCO's petition and adopts and incorporates the 8 Respondents' opposition. ADM/Growmark further contends that RIVCO's petition does not meet the requirements of Rule 76 because it is not limited to questions of law and policy, but rather is an attempt by RIVCO to advance its own commercial interests. ADM/Growmark avers that RIVCO should not be allowed to use an amicus curiae brief to make an argument it could have made in its capacity as an intervenor, especially since it withdrew from the case as an intervenor earlier. Moreover, ADM/Growmark argues, the public interest has been safeguarded by the ALJ and BOE, as mandated by the Shipping Act.

E. Cargill

Cargill, Inc.'s submission is actually a reply to RIVCO's amicus curiae memorandum rather than a reply to the petition for leave to file such memorandum. As this Order only addresses RIVCO's petition and not the merits of its accompanying memorandum, Cargill's reply is not addressed.

DISCUSSION

Participation as an amicus curiae is subject to agency discretion under Rule 76 of the Commission's Rules of Practice and Procedure. 46 C.F.R. § 502.76. A submission by a prospective amicus curiae "shall be limited to questions of law or policy," and "shall identify the interest of the applicant and shall state the reasons why such a brief is desirable." 46 C.F.R. §§ 502.76(a) and (b). Rule 76 also provides that, except as otherwise permitted by the Commission, the brief of an amicus curiae shall be filed "within the time allowed the party whose position as to affirmance or reversal the amicus brief will support," or later for cause shown. 46 C.F.R. § 502.76(c). The inquiry is therefore twofold: whether the prospective amicus meets the requirements of Rule 76, and whether the Commission finds participation by the prospective amicus desirable.

A. Rule 76 requirements

Rule 76 does not specifically contemplate amicus filings with respect to settlements; however, that does not mean that they are forbidden. The Commission's decision in Sea-Land set forth a policy whereby the Commission would generally welcome and accommodate such filings if they comply with the general requirements of Rule 76. 29 S.R.R. 1326. In the spirit of that rule, it would be appropriate to extend that policy to a request to file an amicus with respect to a settlement.

Although there is no clear timetable by which to judge RIVCO's petition, it is timely as RIVCO submitted its petition to the Commission, not the ALJ, and is seeking acceptance of its amicus filing for consideration in the Commission's review of the proposed settlements. In addition, RIVCO's petition will not be summarily rejected because it fails to support a particular party. Rule 76 allows for exceptions to this requirement when the Commission so permits, and therefore it is within the Commission's discretion to allow such a filing. Moreover, we find that RIVCO does seek to address questions of law and policy in its amicus memorandum, in particular the anti-competitive effects of exclusive tug contracts on the Lower Mississippi River. While

RIVCO's proposed amicus filing may also set forth arguments that would benefit its own interests, such arguments are not prohibited.¹ Therefore, we find that RIVCO's petition satisfies the procedural requirements of Rule 76.

B. Whether amicus participation is desirable

Even though RIVCO's petition complies with Rule 76, it is still within the Commission's discretion to determine whether accepting an amicus filing from RIVCO would be desirable. RIVCO's prior status as an intervenor is integral to this determination.²

In seeking to eliminate unnecessary and unhelpful amicus filings, the U.S. Court of Appeals for the Seventh Circuit set forth general standards to be applied in making such a determination:

An amicus curiae brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in

¹ It should be noted that settlements are not precedent-setting determinations as RIVCO claims. The Commission's decision with regard to the proposed settlements does not establish a future policy governing how the Commission deals with settlements in multiparty proceedings. In addition, as BOE observes, the proposed settlements technically are not binding on future litigants.

² The Commission has separate rules governing petitions to file an amicus curiae brief and petitions to intervene in a proceeding. Intervention as a matter of right may be granted by the Commission when there is a clear and convincing showing that "(i) [t]he petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and (ii) [t]he proceeding may, as a practical matter, materially affect the petitioner's interest; and (iii) [t]he interest is not adequately represented by existing parties to the proceeding." 46 C.F.R. § 502.72(b)(1). However, timeliness is relevant, and petitions filed after hearings have been closed will not ordinarily be granted. 46 C.F.R. § 502.72(b)(3).

some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). These standards may be applied in this case.

1. Representation of RIVCO's interests

Because it withdrew from the proceeding and relinquished its status as an intervenor, RIVCO is no longer represented in the proceeding. Neither BOE nor Respondents claims to represent it.

2. RIVCO's perspective

RIVCO contends that it presents information in its amicus memorandum that is not presented by either BOE or Respondents, the only parties to the proceeding. RIVCO argues that BOE, Respondents and the ALJ fail to identify, explain or justify both the differences between the proposed settlements and previous settlement agreements in this proceeding and the proposed settlements' adverse impact on the public. We agree with BOE's claim that the proposed settlements and the previous settlement agreements must be viewed independently. However, to the extent that RIVCO provides information as to how the proposed settlements would affect competition in the tug industry that has not been presented by either BOE or Respondents, RIVCO would set forth a perspective that is not otherwise represented.

3. RIVCO's prior status as intervenor

RIVCO asserts that its amicus filing should be granted because it has a direct interest in the proceeding. As support, RIVCO notes that

the Order to Show Cause initiating the proceeding states that it appears the Shipping Act has been violated with respect to RIVCO. BOE and Respondents agree that RIVCO has an interest in the proceeding, but argue that RIVCO should not be allowed to now act as an amicus when it originally intervened in the proceeding and withdrew of its own accord. RIVCO concedes that it had intervened in the proceeding, but withdrew because it believed it did not have sufficient resources to meaningfully participate.

Generally, amicus participation is used when an entity has an interest in participating in a proceeding to address questions of law and policy. "Such questions will often be difficult to anticipate when a proceeding is in its early stages." *Sea-Land*, 29 S.R.R. at 1328. Rule 76 provides an avenue for participation by an entity that could not fully appreciate the legal and policy implications of a proceeding at the outset of a proceeding. It is not designed as a substitution for intervention.

In this proceeding, RIVCO did fully appreciate that any resolution of the proceeding would directly affect its interests, as evidenced by its intervention. RIVCO was granted intervention as a matter of right, which means that the Commission determined that RIVCO has a substantial interest in the proceeding that could be materially affected and would not be adequately represented by an existing party to the proceeding. 29 S.R.R. 247, 249 (2001) (Order Granting River Parishes Co., Inc.'s Petition for Leave to Intervene). In its Petition for Leave to Intervene, RIVCO relied on the Commission's Order to Show Cause identifying RIVCO as the sole tug company on the Lower Mississippi River that had not been awarded an exclusive tug contract, which was to RIVCO's prejudice or disadvantage. RIVCO's Petition for Leave to Intervene at 1 (citing 29 S.R.R. 232, 235 (2001) (Order to Show Cause)). RIVCO also asserted that it intended to fully participate in the proceeding in its original form, *i.e.*, with no discovery, but that it also reserved the right to participate if discovery were allowed. *Id.* at 2. However, when the Commission restructured the proceeding and determined to allow discovery, RIVCO withdrew, stating that it "lack[ed] the resources to participate on a meaningful basis in the new, restructured, and greatly expanded proceeding."

RIVCO's Notice of Withdrawal of Intervention at 3. RIVCO could have participated on a less than full basis to protect its interests, but gave up its right to do so. Instead, it now seeks to have a second chance to influence the proceeding.

The question thus becomes whether RIVCO should be precluded from participating as an amicus because of its prior status as an intervenor. Allowing an entity to intervene as a party, voluntarily withdraw, and subsequently re-enter in a lesser capacity as amicus curiae undermines certainty and reliability in litigation, and would give RIVCO an unjustified second bite at the apple. Moreover, allowing an amicus filing in the Commission's review of the proposed settlements could have the future effect of deterring parties from entering settlements if they believe they could be subject to criticism from former participants in the litigation. Such a result is contrary to the Commission's interest in settlements generally.³

CONCLUSION

The Commission denies RIVCO's request to participate as an amicus curiae. RIVCO knew the impact the proceeding would have on its business and had the opportunity to participate in this proceeding. RIVCO thus made an informed decision when it withdrew as an intervenor that its position would not be fully represented. It is not in the spirit of the Commission's amicus curiae rule to provide multiple avenues for entities to participate in proceedings. Rather, the rule is designed for entities that are not parties to a proceeding to present helpful discussion regarding law and policy that they could not foresee at the outset of a proceeding. As RIVCO could foresee that the issues in this case would affect its interests and even initially intervened in the proceeding, it is not the type of party the Commission envisioned protecting via its amicus rule. Therefore, RIVCO's petition is denied.

On December 20, 2004, the Commission issued a notice to

³ This result would not preclude RIVCO from filing a complaint against any marine terminal operator it believes has discriminated against it.

review the proposed settlements in light of RIVCO's petition. As the Commission is denying RIVCO's petition, it has determined that no further review is required. Accordingly, the ALJ's December 2, 2004 order approving the proposed settlements and dismissing Respondents from the proceeding is administratively final.

THEREFORE, IT IS ORDERED, That River Parishes Co., Inc.'s Petition for Leave to File a Memorandum as Amicus Curiae is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

A handwritten signature in black ink, appearing to read "B. L. VanBrakle", written in a cursive style.

Bryant L. VanBrakle
Secretary